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ASIA PACIFIC EDUCATION HOLDINGS SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[JUDICIAL REVIEW NO: WA-25-209-06-2021]
B 21 AUGUST 2023

Abstract: *A taxpayer, upon being dissatisfied with the assessment of real property gains tax by the Director General of Income Tax ('DGIR'), on the grounds that the DGIR had failed to consider relevant factors or took into account irrelevant factors (irrationality) or failed to apply the correct provisions of law or misdirected on the facts and so by failing to apply para. 16 of Schedule 2 of the Real Property Gains Tax Act 1976 ('RPGTA'), or arrived at a decision that no reasonable body or authority similarly circumstanced would have arrived at (irrationality), ought to appeal to the Special Commissioners of Income Tax ('SCIT') to have its dissatisfaction known and the impugned assessment set aside. Where there are findings of fact to be made by the SCIT at the appeal stage, an application for judicial review to the court, where the court would have to decide the issues raised based on affidavit evidence that is clearly in dispute, would amount to usurpation of the function of the SCIT, against the intention of the Legislature and the court's power of review.*

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Application to quash assessment by Director General of Income Tax ('DGIR') – Whether case where 'circumstances are very exceptional' – Whether assessment tainted with illegality and/or irrationality and/or deprivation of legitimate expectation – Whether domestic remedy available – Whether DGIR entitled to raise issue of alternative remedy at substantive stage – Whether illegality in sense of 'clear lack of jurisdiction' or 'unlawful treatment' established – Whether DGIR acted within scope set out in Real Property Gains Tax Act 1976 – Whether there was breach of statutory duty*

REVENUE LAW: *Real property gains tax – Assessment – Application for judicial review to quash assessment by Director General of Income Tax ('DGIR') – Whether assessment tainted with illegality and/or irrationality and/or deprivation of legitimate expectation – Whether domestic remedy available – Whether there was breach of statutory duty by DGIR – Whether there were findings of fact to be made by Special Commissioners of Income Tax at appeal stage – Whether DGIR acted within scope set out in Real Property Gains Tax Act 1976*

Asia Pacific Schools Sdn Bhd ('APS'), a company that provides smart teaching and learning curriculum in a group of schools, was the owner of the building that operated as a school. The land on which the school building stood was owned by APIIT Sdn Bhd ('APIIT'). The shareholding in APS was substantially owned by the applicant. International School Partnership

Limited, intending to acquire the APS group of schools, the building and the land, did so through Tenby Educare Sdn Bhd ('Tenby'), its subsidiary company. On 7 December 2018, the applicant entered into a share purchase agreement ('share SPA') to sell its shares in APS to Tenby. Tenby also entered into a sale and purchase agreement ('land SPA') to acquire the land from APIIT wherein APS was nominated to be the acquirer of the land. The Director General of Inland Revenue ('DGIR'), in a letter dated 24 February 2021 informed the applicant of his decision to raise the impugned assessment against the applicant. The DGIR found that APS was a real property company, as defined in para. 34A(6) of Schedule 2 of the Real Property Gains Tax Act 1976 ('RPGTA'), at the date of share SPA, which was the date the land was acquired under the land SPA. The applicant was therefore, subjected to real property gains tax under the RPGTA upon disposal of the APS's shares. Despite the applicant's disagreement with the decision and further discussions and explanations by the applicant, the DGIR, who was not persuaded by the applicant's explanation, proceeded to raise the impugned assessment against the applicant. The applicant thus filed an appeal against the impugned assessment to the Special Commissioners of Income Tax ('SCIT') under sub-s. 18(1) of the RPGTA and, while that appeal was pending, the applicant filed the instant judicial review application for an order of *certiorari* to quash the impugned assessment. The applicant stated that the instant case was one where the 'circumstances are very exceptional', in that, the impugned assessment was tainted with illegality and/or irrationality and/or deprivation of legitimate expectation. The DGIR, on the other hand, submitted that: (i) the judicial review application was an abuse of the process of court as the applicant failed to demonstrate the existence of exceptional circumstances to proceed with judicial review when there is available a domestic appeal procedure under the RPGTA; and (ii) there were certain issues that involved question of facts and law and the application, in essence, was a question concerning the merit of the impugned assessment which was a matter to be determined by the SCIT.

Held (dismissing application):

(1) The applicant's submission that the issue of alternative remedy was fully argued and determined at leave stage was devoid of merit and was against the decision that the availability of domestic remedy was irrelevant at that stage and the matter raised should be dealt with at the substantive stage. The issue of alternative remedy can be raised at the leave stage or at the substantive stage as there is no hard and fast rule. In the instant case, the issue of alternative remedy was not decided at leave stage and was left to be heard and decided at the substantive stage. As such, the DGIR was entitled to raise the issue of alternative remedy to be decided at the substantive stage. (paras 33, 34, 36 & 37)

(2) The purpose of the exceptional circumstances test has nothing to do with the merit of the application. The leave test acts as a sieve to ensure that only an arguable case proceeds to the substantive stage. Exceptional circumstances mean 'unusual circumstances' and not 'typical circumstances' and what amounts to exceptional or unusual circumstances must depend on the factual matrix of each case. (paras 35 & 42)

(3) The test in determining exceptional circumstances were: (i) a clear lack of jurisdiction *vis-à-vis* the general ground of illegality or 'unlawful treatment'; (ii) a blatant failure to perform some statutory duty; and (iii) in appropriate cases a serious breach of the principles of natural justice. The DGIR had made a finding on the documents and scheme of the transactions that APS was a real property company. The facts and circumstances presented did not establish illegality in the sense of 'a clear lack of jurisdiction' or 'unlawful treatment'. The DGIR was acting according to the powers conferred on him and therefore he was within the scope of and not beyond his jurisdiction as set out in the RPGTA. (paras 49, 51, 53 & 54)

(4) Before there can be a breach of statutory duty there must be identified a statutory duty that was breached. The statutory duty must then be 'blatantly' breached by the DGIR. The facts did not show any blatant failure on part of the DGIR to perform some statutory duty. The DGIR was exercising his powers under the RPGTA and arrived at the assessment based on the facts that para. 16 of Schedule 2 of the RPGTA did not apply as he found the agreements were not true conditional contracts. Where there was such a dispute, the condition precedent in para. 16, *ie*, that the agreements were truly conditional contracts, was to be determined by the SCIT. Hence, there were findings of fact to be made by the SCIT at the appeal stage. Only then could it be known whether the DGIR was wrong in not applying para. 16 of Schedule 2 of the RPGTA. This court could not decide the issues raised based on affidavit evidence that was clearly in dispute. (paras 56, 58 & 62)

Case(s) referred to:

Allianz General Insurance Company (Malaysia) Bhd v. Ketua Pengarah Hasil Dalam Negeri [2022] 1 LNS 650 CA ***(refd)***

Bintulu Lumber Development Sdn Bhd v. Director General Of Inland Revenue (Civil Application No. 01(f)-28-10-2019) (Unreported) ***(refd)***

Exxon Chemical (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2005] 4 CLJ 810 CA ***(refd)***

Flextronics Shah Alam Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2018] 7 CLJ 487 HC ***(refd)***

Government Of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***

Iskandar Coast Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2019] 7 CLJ 143 CA ***(refd)***
Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 2 CLJ 1 FC ***(refd)***
Ketua Pengarah Hasil Dalam Negeri v. Ensco Gerudi (M) Sdn Bhd [2023] 6 CLJ 350 CA ***(refd)***
Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd [2017] 5 CLJ 283 CA ***(refd)***
Ketua Pengarah Hasil Dalam Negeri v. The Pataling Rubber Estates Ltd [2011] 5 CLJ 286 HC ***(refd)***
Magnum Holdings Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Other Cases [2018] 1 LNS 2278 HC ***(dist)***
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***
Metacorp Development v. Ketua Pengarah Hasil Dalam Negeri [2011] 1 LNS 1002 HC ***(dist)***
Multi-Purpose International Ltd v. Ketua Pengarah Hasil Dalam Negeri [2020] 1 LNS 49 HC ***(dist)***
National Land Finance Co-operative Society Ltd v. Director General Of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***
Society Of La Salle Brothers v. Ketua Pengarah Hasil Dalam Negeri [2017] 8 CLJ 298 CA ***(refd)***
Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd [2002] 3 CLJ 624 CA ***(refd)***
Tune Insurance Malaysia Bhd v. Ketua Pengarah Hasil Dalam Negeri [2019] 1 LNS 1276 HC ***(dist)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Legislation referred to:
Income Tax Act 1967, Schedule 5, para 26
Interpretation Acts 1948 and 1967, s. 30
Real Property Gains Tax Act 1976, ss. 2, 7, 18(1), Schedule 2 paras 15(2), 16, 34A(6)

For the applicant - Vijey M Krishnan & William Wong; M/s Raja, Darryl & Loh
For the respondent - Ashrina Ramzan Ali & Wan Khairuddin Wan Montil; SRCs & Surani Che Ismail & Athari Faris Ammery Hussein; RCs

Reported by S Barathi

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] On 10 April 2023, I dismissed an application for judicial review by Asia Pacific Education Holdings Sdn Bhd ("the applicant") wherein an order of *certiorari* to move into this court for the purpose of it being quashed the assessment raised by the respondent, the Director General of Inland Revenue ("DGIR") stated in the notice of assessment dated 15 March 2021 which was issued to the applicant for the year of assessment ("YA") 2019 ("the impugned assessment").

[2] In my view, it is an abuse of the process of the court to file the instant application for judicial review which should be determined by the Special Commissioners of Income Tax ("the SCIT") on appeal in light of the alternative remedy provided under sub-s. 18(1) of the Real Property Gains Tax Act 1976 ("RPGTA"). The applicant, in my view, not only failed to demonstrate exceptional circumstances for filing the instant application for judicial review but more importantly the matters raised was a question of law and fact which could only be determined by the SCIT on appeal after hearing all the evidence and making the necessary findings of fact.

[3] In doing so, I was not persuaded by counsel who submitted that the facts were not in dispute and the issue before me was a question of law, namely whether the DGIR could treat a company, to wit, Asia Pacific Schools Sdn Bhd ("APS") as a real property company in disregard of para. 16 read together with para. 15(2) of the Schedule 2 of the RPGTA. The reasons for my decision are as follows.

Background Facts

[4] APS is a company that provides smart teaching and learning curriculum in a group of schools. The shareholding in APS is substantially owned by the applicant. APS is the owner of the building operated as a school on a piece of land but is not the owner of the land on which the building stands ("the school building"). The land on which the school building stands ("the land") is owned by APIIT Sdn Bhd ("APIIT").

[5] International School Partnership Limited ("ISPL") intended to acquire the APS group of schools, the building and the land. It did so through Tenby Educare Sdn Bhd ("Tenby"), its subsidiary company which operated several private education institutions. Tenby would in the scheme of things:

(i) enter into a share purchase agreement for APS's shares; and

(ii) enter into a sale and purchase agreement to purchase the land.

[6] On 7 December 2018, the applicant entered into a share purchase agreement ("the share SPA") to sell its shares in APS to Tenby. The share sale was approved by the Ministry of Education on 1 March 2019. Also, on 7 December 2018, Tenby entered into a sale and purchase agreement ("the land SPA") to acquire the land from APIIT wherein APS was nominated to be the acquirer of the land. The acquisition of the land was approved by the State Authority on 26 June 2019.

[7] The DGIR in a letter dated 2 March 2020, sought certain documents on an audit he was conducting on the applicant. The applicant complied with the request which resulted in an exchange of communication between the parties as per letters dated 5 October 2020, 18 December 2020 and 5 February 2021. The DGIR, after considering the documentary evidence,

informed the applicant in a letter dated 24 February 2021 of his decision to raise the impugned assessment against the applicant. The DGIR explained that he found that APS was a real property company as defined in para. 34A(6) of the Schedule 2 of the RPGTA at the date of share SPA, *ie*, 7 December 2018 which is the date the land was acquired under the land SPA. Thus, the applicant was subject to real property gains tax under the RPGTA upon disposal of the APS's shares.

[8] The applicant disagreed with the decision of the DGIR and this resulted in discussions and explanations on the matter in another round of letters being exchanged between the parties (see the letters dated 24 February 2021, 5 March 2021 and 9 March 2021). The DGIR was not persuaded by the explanation given by the applicant pertaining APS being a real property company and proceeded to raise the impugned assessment against the applicant.

[9] The applicant, on 5 April 2021, filed an appeal against the impugned assessment to the SCIT under sub-s. 18(1) of the RPGTA and while that appeal was pending, the applicant on 11 June 2021, filed the instant judicial review application seeking an order of *certiorari* to quash the impugned assessment.

The Impugned Assessment

[10] In the instant case, the DGIR made a finding from the audit including discussions and explanations *vide* the exchange of letters that the disposal of APS shares by the applicant to Tenby was subject to real property gains tax. The DGIR found that APS, on 6 May 2019, the date of the disposal of the shares was a real property company. A 'real property company' is defined in para. 34A(6), Schedule 2 of the RPGTA to mean:

> A controlled company to which subparagraph (a) is not applicable, but which, at any date after 21 October 1988, acquires real property or shares or both whereby the defined value of real property or shares or both owned at that date is not less than seventy-five per cent of the value of its total tangible assets.

[11] The phrase "controlled company" is defined in sub-para. 34A(6) of the Schedule 2 of the RPGTA to mean "a controlled company as defined under the Income Tax Act 1967". Under the ITA, a "controlled company" is defined to mean, "a company having not more than 50 members and controlled, in the manner described by s. 139, by not more than five persons".

[12] The phrase "real property" is defined in s. 2 of the RPGTA to mean:

> any land situated in Malaysia and any interest, option or other right in or over such land.

[13] The DGIR found the following facts based on the documents produced at the audit. The applicant together with Teknologi Pantas Sdn Bhd ("TPSB"), were owners of 2,500,002 and 250,000 units of ordinary shares in APS respectively. They sold their shares to Tenby *ie*, the special purpose vehicle buyer of ISPL.

[14] Clause 4.1.2 in the share SPA shows that the applicant has an interest in APS wherein APS has the said land which was put up as collateral to HSBC Bank as early as 19 December 2017. The applicant requires HSBC Bank's approval for the sale of the shares as well as the sale of the land pursuant to the RM250,000,000 facility obtained by the applicant from the said bank. The applicant, therefore had put up the land as early as 19 December 2017 as collateral for the facility and later disposed of the shares of APS on 7 December 2018. Thus, according to the DGIR, at the time of the disposal of the shares on 6 May 2019, the APS shares were subject to real property gains tax.

[15] The DGIR, said that APS had the right or had obtained interest in the land and the land was a part of the disposal of the shares *via* the share SPA. This fact, according to the DGIR, would establish that APS had become a real property company at the time of the disposal of APS shares by the applicant. While APIIT, under the land SPA sold the land to Tenby. In the scheme of things between the parties, the land SPA was executed at the same time with the share SPA and the former was made an integral part of the latter because the sale of the land is the basis of the sale of the said shares. This scheme, according to the DGIR, meant that on 7 December 2018, the date of the said agreements, APS had acquired the right and interest in the said land, making it a real property company as the defined value of real property at that date was not less than 75% of the value of APS's total tangible assets.

[16] The DGIR said that cl. 13.2 of the land SPA allows the purchaser to nominate a person as the purchaser. APS was nominated and received the land as purchaser *via* a letter dated 6 May 2019. The DGIR however, found that in substance, the land was obtained by APS on 7 December 2018 or as early as 19 December 2017 and was made a crucial part of the share SPA. The entire scheme was perfected on 6 May 2019. In substance, the transactions show that the sale of the shares is the main transaction and the land became part of the share SPA. APS had obtained the land on 7 December 2018 wherein it became a real property company on the said date resulting in the APS shares being sold on 6 May 2019 to Tenby. Ultimately, all the transactions made APS the owner of the land and Tenby the owner of APS.

[17] According to the DGIR, since the land obtained by APS has the defined value of real property at that date of not less than 75% of the value of its total tangible assets which made APS a real property company

following which the disposal of APS shares by the applicant became subject to real property gains tax. The transactions alluded to above, show the intention of the parties of the scheme of things *ie*, to give the land to APS while the actions of the applicant reflected the implementation of the said intention wherein the land was given to APS through indirect transactions.

[18] The following information was gleaned from "Form BPS VIII" which is an application to sell, dispose or to re-develop a private development institute by APS: (i) the applicant disposed shares to Tenby, who was ISPL's subsidiary company and operating several private education institutions, and who was to receive the shares; (ii) APS received the said land; (iii) the directors of APS are foreign nationals; (iv) ISPL is the new owner; and (v) ISPL continues the re-development of APS through Asia Pacific Schools Sdn Bhd. According to the DGIR, the facts clearly show that the scheme was that the land be acquired by APS which was the owner of the school building which stood on the land through the mechanism of the share SPA and the land SPA both executed on the same date *ie*, 7 December 2018. In this scheme, it is clear that the sale of the said land is a crucial part of the sale of shares transaction.

[19] The DGIR said that although there is a requirement labelled as "condition precedent" in the share SPA and land SPA, the actions of the parties were that the shares in possession of the applicant be sold to Tenby and Tenby in turn acquires the land and nominates APS as the purchaser. The intention all along was to make APS the owner of the land. This was the scheme of things and a crucial part of the share SPA. The transfer of the shares made APS owner or acquired the right and interest in the said land accordingly became a real property company.

[20] The DGIR considered the share transaction as a whole and found that the condition labelled by the applicant as a condition precedent, in actual fact, is not a condition precedent, that is to say, that the approval from the State Authority on the acquisition and disposal of the land had no bearing on the scheme. The share had the land being identified and made part of the sale of shares, shows that APS has acquired rights and interest in the said land. The reference to the land as APS land in the share SPA clearly shows that at the time of disposal of the said shares, APS had acquired the said land at the latest on 7 December 2018 *ie*, before the disposal of the shares.

[21] The DGIR found on the facts that APS had become a real property company on 7 December 2018 according to the scheme of things as reflected in the land SPA between APIIT and Tenby and at the same time, the said land was stated as APS land in the share SPA which made the land a crucial part of share SPA. The DGIR found that the transactions are between controlled companies. The applicant is a controlled company and has acquired shares in a real property company. At the time of the disposal of

APS shares, the land had been acquired, making APS a real property company. Thus, the disposal of APS shares to Tenby on 6 May 2019 is subject to RPGT.

Grounds Of Review

[22] In the O. 53 statement, the applicant states that the instant case is one where the "circumstances are very exceptional" in that the impugned assessment was tainted with illegality and/or irrationality and/or deprivation of legitimate expectation.

[23] The illegality ground can be summarised as follows. The DGIR wrongly found that APS had acquired real property on 6 May 2019 when the actual date was 26 June 2019. In doing so, the DGIR failed to consider para. 16 of the Schedule 2 of the RPGTA which provides that where the acquisition of a chargeable asset requires the approval of the Government or body appointed by the Government in a sale and purchase agreement, the date of the acquisition would be the date of such approval being obtained *ie*, 26 June 2019, on the facts of the instant case. In coming to the finding, the DGIR also failed to consider:

(i) the decision in *Ketua Pengarah Hasil Dalam Negeri v. The Pataling Rubber Estates Ltd* [2011] 5 CLJ 286 on the interpretation of para. 16 of the Schedule 2 of the RPGTA; and

(ii) the principles of construction of a taxing statute provided in *National Land Finance Co-operative Society Ltd v. Director General Of Inland Revenue* [1993] 4 CLJ 339 and *Exxon Chemical (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2005] 4 CLJ 810.

[24] The irrationality ground was framed as follows. A reasonable person or body similarly circumstanced would not have decided in the manner in which the DGIR did, in particular, considering the facts and paras. 15(2) and 16 of the Schedule 2 of the RPGTA. In doing so, the DGIR did not give even the briefest of thought to the High Court decision case of *Pataling Rubber Estates* and the decisions in *National Land Finance* and *Exxon Chemical* on the interpretation and construction of a taxing statute. And finally, on the legitimate expectation, it was stated that the applicant had the expectation that the DGIR would take cognisance of the decision in *Pataling Rubber Estates.*

The DGIR's Submission

[25] It was firstly submitted on behalf of the DGIR that the instant judicial review application is an abuse of the process of court as the applicant failed to demonstrate the existence of exceptional circumstances to proceed with judicial review when there is an available domestic appeal procedure. The RPGTA provides an avenue of appeal under s. 18 to the SCIT by an aggrieved taxpayer against an assessment raised by the DGIR.

[26] The DGIR cited the decision of the Supreme Court in *Government Of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 which established the principle that the court will exercise its discretion allowing the remedy of judicial review in exceptional circumstances when there is an available domestic appeal procedure. A

[27] It was secondly submitted that there are certain issues that involve question of facts and law, such as, whether the disposal of shares in the instant case involves a real property company and the finding would be one of fact. It was also argued that the application, in essence, is a question concerning the merit of the impugned assessment and any such question is a matter to be determined by the SCIT. B C

The Applicant's Submission

[28] The applicant firstly opposed what is termed as a re-ventilation of the domestic remedy issue on the basis that the same had been fully argued and decided by this court at the leave stage with the participation of the DGIR – then the putative respondent on invitation by the court – and this court had rejected the argument and granted leave. It was further submitted that the granting of leave demonstrated that there were exceptional circumstances and as such, the issue cannot be raised again. D

[29] The applicant, in the alternative, submitted that the instant case fell within the principle of *Jagdis Singh* and the applicant was entitled to bring judicial review proceedings notwithstanding that its appeal to the SCIT was pending. In its written reply, the applicant submitted that the case before me was a "classic case of illegality, and irrationality and unreasonableness, and clear lack of jurisdiction and blatant failure to perform a statutory duty". The last two grounds were added in submissions and did not appear in the O. 53 statement. It was further contended that the DGIR, "must apply the black letter of the law and case law authority, and cannot impose his own requirements in the legislation simply on taxpayers". E F

[30] To support the above contention, the circumstances claimed to be exceptional circumstances were that the DGIR, in raising the impugned assessment, had failed to consider the true effect of paras. 15, 16 and 34A of the Schedule 2 of the RPGTA. In doing so, the DGIR did not apply the decision in *Pataling Rubber Estates* which had held that the date of disposal of an asset with regard to a conditional contract where approval of the Government is required is the date of such approval as provided in para. 16 of the Schedule 2 of the RPGTA. It is contended that the failure to follow the above provisions and the case of *Pataling Rubber Estates* resulted in the DGIR making an error as to the correct date of disposal and therefore, wrongly raised the tax against the applicant. G H I

[31] The cases of *Metacorp Development v. Ketua Pengarah Hasil Dalam Negeri* [2011] 1 LNS 1002; [2011] 5 MLJ 447; *Magnum Holdings Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Other Cases* [2018] 1 LNS 2278; (2018) MSTC 30-151 at 8654; *Tune Insurance Malaysia Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2019] 1 LNS 1276 and *Multi-Purpose International Limited v. Ketua Pengarah Hasil Dalam Negeri* [2020] 1 LNS 49 were cited to show that the test of exceptional circumstances in *Jagdis Singh* was satisfied.

Decision Of The Court

[32] The question to be determined at the outset is whether the DGIR is entitled to raise the issue that the instant application for judicial review is an abuse of the process of the court in view of the existence of the alternative remedy of appeal to the SCIT provided by the Legislature in the RPGTA.

Whether The Alternative Remedy Issue Can Be Raised?

[33] The first submission by the applicant was that the issue of alternative remedy was fully argued and determined by Noorin Badaruddin, the learned judge who heard and allowed the application for leave to commence the instant judicial review application. The second and related submission was that the granting of leave demonstrated that the exceptional circumstances test was satisfied and therefore cannot be raised again.

[34] The first submission is devoid of merit and is against what was decided by the learned judge as shown in Her Ladyship's written judgment dated 22 June 2022 (filed as encl. 43). There, Her Ladyship followed the decision in *Flextronics Shah Alam Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2018] 7 CLJ 487, "to wit, the existence or non-existence of a sufficient alternative remedy is something that should be canvassed at the substantive stage and is therefore a premature objection to be raised now at the leave stage". The decision of Her Ladyship is encapsulated in the following words:

> [28] This Court takes the position that the availability of the domestic remedy is irrelevant at this stage and the matter raised herein should be dealt with at the substantive stage.

[35] The second submission: that the granting of leave demonstrated that the exceptional circumstances test was satisfied is also devoid of merit. My reasons for rejecting the submission are that the purpose of the exceptional circumstances test has nothing to do with the merit of the application but whether the application should be allowed in the first place. Leave, on the other hand, is permission to commence judicial review proceedings. The exceptional circumstances test only arises when there is an alternative remedy provided by statute that has not been exhausted. The test determines whether the judicial review application ought to be dismissed on account of the availability of the alternative remedy. On the other hand, the test of whether leave ought to be granted is for a different purpose and has been

settled in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478. The leave test acts as a sieve to ensure that only an arguable case proceeds to the substantive stage.

[36] A connected issue is the stage at which the issue of alternative remedy can be raised. The Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65 provided the answer and said that it could be at the leave stage or at the substantive stage as there is no hard and fast rule. The position is set out clearly in the following passage in the judgment (cited cases omitted):

> As we have said, ... the existence of alternative remedies **would be a ground for refusing leave to apply for judicial review. It is also a ground for setting aside a grant of leave given earlier.** Again, the alternative remedies argument may be considered at the *inter partes* stage, even if leave had been granted and not challenged. **At the final hearing stage, the court can consider the alternative remedies objection as a preliminary point** or at a later stage. (emphasis added)

[37] In the instant case, the issue of alternative remedy was not decided at leave stage and was left to be heard and decided at the substantive stage. As such, based on the principles stated in *Majlis Perbandaran Pulau Pinang*, I hold that the DGIR is entitled to raise the issue of alternative remedy to be decided at the substantive stage.

The Alternative Remedy Issue

[38] The next question is whether the instant application for judicial review is an abuse of the process of court in view of the non-exhaustion of the alternative remedy, provided in the RPGTA, of an appeal by an aggrieved taxpayer to the SCIT against the assessment of the DGIR.

[39] It is necessary to begin with the law in this somewhat vexed and/or misunderstood area. The landmark case is *Jagdis Singh*. There, the Supreme Court said that a remedy seeking judicial review should not be made available where the statute provides for an alternative remedy unless exceptional circumstances are shown. *Jagdis Singh* was a tax case where an assessment of the DGIR was sought to be quashed by judicial review under the ITA which is the same position of an assessment to be quashed under the RPGTA, as the same provisions of an appeal to the SCIT apply for assessments under the RPGTA.

[40] It suffices to say that the test of exceptional circumstances has been consistently applied in tax cases and was reiterated again by the Federal Court in *Bintulu Lumber Development Sdn Bhd v. Director General Of Inland Revenue* (Civil Application No. 01(f)-28-10-2019), (see the decision of the

Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v. Ensco Gerudi (M) Sdn Bhd* [2023] 6 CLJ 350 which discussed the broad grounds for the decision rendered in the *Bintulu Lumber Development* case.

[41] In *Jagdis Singh,* the High Court issued the order of *certiorari* to quash the assessment. On appeal, the issue was whether the application for judicial review ought to have been dismissed in light of the alternative remedy of appeal to the SCIT which was not exhausted. The Supreme Court, after considering various cases on the subject, propounded the following principle, the *ratio decidendi* of the case, which have been often-quoted by our courts at the High Court and Court of Appeal since:

> A clear principle is reiterated here *ie*, it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. **Judicial review is always at the discretion of the Court but where there are other avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.**
>
> In answer to the first question we would therefore hold that the discretion is still with the Courts but where there is an appeal provision available to the applicant *certiorari* should not normally issue unless there is shown **a clear lack of jurisdiction or a blatant failure to perform some statutory duty** or in appropriate cases **a serious breach of the principles of natural justice.** (emphasis added)

[42] This brings me to the next important issue: what amounts to very exceptional circumstances. The decision of the Court of Appeal in *Iskandar Coast Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2019] 7 CLJ 143; [2019] 5 MLJ 236 (followed in *Allianz General Insurance Company (Malaysia) Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2022] 1 LNS 650) is instructive. It said that exceptional circumstances mean 'unusual circumstances' and not 'typical circumstances' and what amounts to exceptional or unusual circumstances must depend on the factual matrix of each case.

[43] Therefore, the facts alleged in the application for judicial review is of primary importance. The facts must, of course, be undisputed as the remedy of judicial review concerns the legal significance of undisputed or admitted facts and does not involve the review court resolving a disputed question of fact or making of a finding of fact. Under, the RPGTA, like the ITA, resolving disputes of fact is the function of the SCIT. If there are disputes of facts, the application for judicial review will be dismissed as the proper forum to resolve such dispute is the SCIT (see *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1).

[44] This brings me to the other apex court case where the issue of alternative remedy was discussed. It is the *Majlis Perbandaran Pulau Pinang* case. There, the Federal Court said that where the alternative remedy concerns a specialised body, judicial review will not be granted in the following words:

> **Having said that** we recognise that there are certain classes of cases such as planning, employment cases and tax cases ..., where a statute provides for a specialised appeal procedure, and so the courts understandably may not grant judicial review but this is always subject, to the grant of review in certain cases for example, where an applicant is able to demonstrate excess or abuse of power, or breach of the rules of natural justice.
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> (emphasis added)

[45] The words 'having said that' referred to one of the preceding paragraphs which have been cited subsequently by some decisions where illegality appears to be another ground to allow judicial review proceedings to be heard in the following paragraphs:

> Speaking generally, it is right to say, that if an applicant in judicial review proceedings can demonstrate **illegality, that is to say unlawful treatment,** it would be wrong to insist that he exhaust his statutory right of appeal where one is available. Why should illegal action be not nipped in the bud by the quicker, more convenient and adequate remedy of Judicial Review rather appeal? It is, of course, true that convenience in this context means convenience not only for the parties but also in the public interest.
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> (emphasis added)

[46] There, illegality was specifically referred to as "unlawful treatment". In this regard, the position was clarified by Gopal Sri Ram JCA (as His Lordship then was) speaking for the court in *Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd* [2002] 3 CLJ 624. His Lordship said that the law on alternative remedy was settled in *Jagdis Singh* and that 'lack of jurisdiction' comes within the general category of illegality. The following paragraphs of the judgment are instructive.

> That brings us to the next point, which we will call "the alternative remedy" argument. We find copious citation of authorities on this part of the case to be wholly unnecessary. In our view, the law is well settled. It has been settled by the judgment of that eminent judge, Hashim Yeop A. Sani SCJ (as he then was) delivering the decision of the Supreme Court in *Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ (Rep) 110) where he said:
>
> > In answer to the first question we would therefore hold that the discretion is still with the courts but where there is an appeal provision available to the applicant *certiorari* should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.
>
> We may add that "lack of jurisdiction" now comes within the category of illegality formulated by Lord Diplock in his Delphic speech in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374. And it is in that context that our Federal Court applied it in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65.

[47] The 'clear lack of jurisdiction' *vis-a-vis* illegality was applied by the Court of Appeal in *Society Of La Salle Brothers v. Ketua Pengarah Hasil Dalam Negeri* [2017] 8 CLJ 298. In that case, the DGIR had no jurisdiction to raise the tax on the society under the ITA when the society had been exempted from tax under the repealed Income Tax Ordinance 1947. The vested right from the exemption under the repealed Ordinance was not revoked by any provision of the ITA, when the latter came into force, and was still in force by virtue of s. 30 of the Interpretation Acts 1948 and 1967. Tengku Maimun Tuan Mat JCA (as Her Ladyship then was) said:

> [48] Given that the respondent acted without jurisdiction, the third issue has to be resolved in favour of the appellant. Notwithstanding that it has failed to resort to the appeal procedure under s. 99 of the ITA 1967, the appellant cannot be precluded from applying for judicial review. This principle was set out in *Government of Malaysia & Anor v. Jagdis Singh* (*supra*) where Hashim Yeop Sani SCJ said ...

[48] In the same vein, the principle was reiterated in the case of *Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd* [2017] 5 CLJ 283 where the Court of Appeal held:

> [28] Obviously, the respondent, in the circumstance of this appeal had failed to fulfil the principles so lucidly stated by the Supreme Court in *Jagdis Singh*. In our judgment, there **was no clear lack of jurisdiction for the field audit conducted by the appellant was within its statutory powers under ss. 80 and 81 of Act 53,** neither was there any proof of a blatant failure by the appellant to perform its statutory duty nor any serious breach of natural justice. (emphasis added)

[49] Thus, by virtue of these two apex court decisions, the following, if the facts so established, have been accepted as amounting to exceptional circumstances:

(i) a clear lack of jurisdiction *vis-a-vis* the general ground of illegality or "unlawful treatment";

(ii) a blatant failure to perform some statutory duty; and

(iii) in appropriate cases, a serious breach of the principles of natural justice.

Applying The Test

[50] As alluded to above, the applicant's case was that the facts and circumstances before the court raise exceptional circumstances, namely, illegality or a blatant failure to perform a statutory duty. To determine whether the exception circumstances test is satisfied, the factual matrix presented to the court is crucial.

[51] The factual matrix produced before me shows that the DGIR had made a finding on the documents and scheme of the transactions that APS is a real property company. The finding was made based on the following facts:

(i) the share SPA and the land SPA;

(ii) the fact that the land had been put up as collateral to HSBC Bank as early as 19 December 2017 and that HSBC's approval for the sale of APS shares was needed by the applicant pursuant to the facility of RM250,000,000 obtained by the applicant from the said bank;

(iii) the fact that by virtue of the share SPA, APS has the right or obtained interest in the land;

(iv) the fact that the land was an integral and crucial part of the share SPA; and

(v) that what the parties labelled as a condition precedent in the share SPA and the land SPA was not a true condition precedent in view of the fact that APS had acquired rights and interest in the land before the disposal of the APS shares.

[52] To the DGIR, APS had, on the said facts, become a real property company before the disposal of the shares by the applicant and therefore para. 16 of the Schedule 2 of the RPGTA, relied heavily by the applicant, does not apply. The applicant, on the other hand, had refuted the DGIR's assessment and analysis of the facts and said that the DGIR failed to appreciate that the share SPA and the land SPA were conditional contracts and therefore by virtue of para. 16 of the Schedule 2 of the RPGTA, the date of disposal of the asset was when the Government approval was obtained and not the date stated by the DGIR. The DGIR failed to consider that the interpretation of para. 16 made by the High Court in *Pataling Rubber Estates* was binding him, and the DGIR must follow the requirements of legislation and not supplant and add words into the same as established in *National Land Finance* and *Exxon Chemical*.

'A Clear Lack Of Jurisdiction' Or 'Unlawful Treatment'

[53] I found that the facts presented to me did not establish the situation of illegality *ie*, a clear lack of jurisdiction or unlawful treatment. The DGIR had clearly acted within his jurisdiction and exercised his powers within that jurisdiction. He was exercising powers under the RPGTA and arrived at the assessment that para. 16 did not apply as he found the agreements were not true conditional contracts on the facts before him which revealed that APS was already a real property company. In my mind, where there is such a dispute, the condition precedent *ie*, that the agreements are truly conditional contracts for the application of para. 16, as reflected in *Pataling Rubber Estates,* is not triggered. In these circumstances, the DGIR cannot be said to have flouted the principles stated in *National Land Finance* and *Exxon Chemical*. In such circumstances, the finding of fact is for the SCIT to make.

[54] I found that the facts and circumstances presented did not establish illegality in the sense of 'a clear lack of jurisdiction' or 'unlawful treatment'. The DGIR was acting according to the powers conferred on him and therefore he was within the scope of and not beyond his jurisdiction as set out in the RPGTA. The DGIR is the taxing authority established under the RPGTA and empowered to levy tax by way of assessments. In carrying out this function, it is within his power to carry out an audit, determine the appropriate assessment, and decide whether a company is a real property company and when that company became a real property company.

[55] The DGIR is empowered to use his judgment based on the facts before him. It is envisaged that he cannot be 100% correct all the time when exercising his powers and that is why the Legislature has established the SCIT and the avenue of appeal for taxpayers aggrieved with the assessment raised against them by the DGIR. The SCIT is empowered to make findings of fact based on the evidence led before them and is further empowered to confirm, discharge or amend the assessment made by the DGIR (see para. 26 of the Schedule 5 of the ITA). Thus, if the DGIR wrongly made an assessment, the SCIT can discharge the same without more. The SCIT is conferred the jurisdiction to not only put right excessive or incorrectly increased taxes but also put right by setting aside taxes which the SCIT is of the view were erroneously raised against the taxpayer.

'Blatant Failure To Perform Some Statutory Duty'

[56] The facts presented to me did not show any blatant failure on the part of the DGIR to perform some statutory duty. In fact, my attention was not even drawn to any statutory provision in any written law that imposed a statutory duty on the DGIR. It is elementary that before there can be a breach of statutory duty, there must be identified a statutory duty that was breached. The question is, what statutory duty did the DGIR allegedly breach? It is incumbent on the taxpayer to identify the provision that contains the statutory duty. The language of the provision must impose an unqualified statutory obligation or a statutory prohibition or statutory command on the DGIR in relation to the assessment raised against the taxpayer. The statutory duty must then be 'blatantly' breached by the DGIR. 'Blatantly' is what it means – the doing of something so obviously or intentionally knowing it is against the duty imposed on him. Only then it would amount to a blatant breach of statutory duty amounting to exceptional circumstances envisaged by the Supreme Court in *Jagdis Singh*.

[57] In the instant case, the applicant referred to paras. 15, 16 and 34A of the Schedule 2 of the RPGTA which were also the provisions referred to when submitting on illegality as discussed above. Firstly, the said paragraphs do not impose a statutory duty on the DGIR. The paragraphs appear in Schedule 2 which contain supplementary provisions for the purpose of s. 7

of the RPGTA which is the provision providing the manner in which the disposal price and acquisition price of a chargeable asset are computed when the same is disposed of. It also provides for connected matters of determining the date of disposal. The disposal price and the acquisition price of such an asset will determine whether there is a chargeable gain. A gain would then be chargeable with tax. Section 7 of the RPGTA is reproduced below for its effect:

(1) Where a chargeable asset is disposed of, then:

(a) if the disposal price exceeds the acquisition price, there is a chargeable gain;

(b) if the disposal price is less than the acquisition price, there is an allowable loss; and

(c) if the disposal price is equal to the acquisition price, there is neither a chargeable gain nor an allowable loss.

(2) In this section, an allowable loss means a loss suffered on the disposal of a chargeable asset which, if it had been a gain, would have been chargeable with the tax.

(3) **Subsection (1) shall be subject in its operation to Schedule 2, which shall have effect for computing acquisition and disposal prices and otherwise as provided therein.**

(4) Where:

(a) there is an allowable loss in respect of a disposal, such allowable loss shall be allowed as a deduction to reduce the total chargeable gain of a person for a year of assessment in which the disposal was made; and

(b) by reason of an insufficiency or absence of total chargeable gain for the year of assessment in which the allowable lose arose, effect cannot be given in full to paragraph (a), the allowable loss which has not been so allowed (or so much thereof as has not been so allowed for that year) shall be allowed as a deduction to reduce the total chargeable gain of a person for the first subsequent year of assessment for which there is total chargeable gain and so on for subsequent years of assessment until the whole amount of the allowable loss to be allowed has been allowed.

(5) For the purposes of subsection (4), in the case of an individual, the chargeable gain referred to in that subsection shall exclude any amount exempt under Schedule 4. (emphasis added)

[58] Thus, Schedule 2 provides the method of deriving chargeable gain and allowable loss which includes the date of disposal of a chargeable asset and whether a company is a real property company for such purpose. There was no statutory duty on the DGIR as such. The DGIR was exercising his powers

under the RPGTA and arrived at the assessment based on the facts that para. 16 of the Schedule 2 of the RPGTA did not apply as he found the agreements were not true conditional contracts on the facts before him which revealed that APS was already a real property company. In my mind, and as shown above, where there is such a dispute, the condition precedent in para. 16 *ie*, that the agreements are truly conditional contracts is to be determined by the SCIT. If there was no dispute that the agreements were conditional contracts, then the DGIR would be wrong in not complying with not a statutory duty but with the decided case law *ie*, *Pataling Rubber Estates.*

Cases Cited By The Applicant

[59] It suffices to say that the cases cited by the applicant *ie*, *Metacorp Development, Magnum Holdings, Tune Insurance* and *Multi-Purpose International* are distinguishable on the facts. Copious citation of authorities does not help if the facts are not on all fours with the present case. As observed above, each case would depend on its own factual matrix. For the sake of repetition, it was shown above that in the instant case, the condition precedent for the invocation of para. 16 of the Schedule 2 of the RPGTA was in dispute. Therefore, this is not a case where the DGIR has refused to follow a legal interpretation determined by the High Court or a court higher than the High Court.

[60] Further, the case of *Multi-Purpose International* was a decision concerning the leave stage where the learned Judicial Commissioner did not even decide on the issue of exceptional circumstances and left it for determination at the substantive stage of the application. The case therefore does not assist the applicant.

Conclusion

[61] The situation before me is a clear case where the applicant is clearly dissatisfied with the assessment made. A taxpayer who is dissatisfied with the assessment on the grounds that the DGIR failed to consider relevant factors or took into account irrelevant factors (irrationality) or failed to apply the correct provisions of law on the facts or misdirected itself on the facts and so by failing to apply para. 16 of the Schedule 2 of the RPGTA, or arrived at a decision no reasonable body or authority similarly circumstanced would have arrived at (irrationality) ought to appeal to the SCIT to have its dissatisfaction known and the impugned assessment set aside.

[62] In the instant case, there were findings of fact to be made by the SCIT at the appeal stage. Only then could it be known whether the DGIR was wrong in not applying para. 16 of the Schedule 2 of the RPGTA. This court cannot decide the issues raised based on affidavit evidence that is clearly in dispute. Otherwise, this court will be usurping the function of the SCIT against the intention of the Legislature and this court's power of review.

[63] I was satisfied that there were no special or exceptional circumstances that would bring the instant application to be within the *Jagdis Singh* or *Majlis Perbandaran* cases. As such, the applicant should pursue the appeal that has been filed and is presently pending before the SCIT. For the above reasons, the application for judicial review was dismissed.

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